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Electronic signing in a pandemic

Luke Paterson and Rob Macredie

The global response to the coronavirus (COVID-19) pandemic has resulted in many ordinary business dealings now being undertaken remotely due to social distancing protocols and border shutdowns. The resulting business environment has become one of increasing electronic commerce across many industries. As the isolation period continues, we expect to see businesses continuing to operate as far as possible by replacing physical with electronic means wherever possible, with the aim of mitigating disruption to their operations as much as practicable.

One key aspect of electronic commerce which is already well-positioned for this situation is the signing of documents by electronic and digital means—the electronic transactions legislation serves to make electronic signatures as valid as physical signatures, provided certain criteria are satisfied. However, the use of electronic signatures to achieve efficiencies and more easily do business without the need for physical proximity does require careful consideration, as there are a number of tips and traps that could result in unintended consequences for the unwary. This paper answers some of the most frequently asked questions.

What constitutes an electronic signature?

An electronic signature is any method by which a person 'signs' a

document through a mark or representation of a name or signature as opposed to a physical 'wet ink' signature.

Example. Common types of electronic signatures

Some common examples of electronic signatures that are regularly used, especially where there is a lack of physical proximity of the relevant parties, are pasting an image of a signature into an execution block, signing a document on a stylus or touchscreen, and using the 'signing' function of a digital signing platform (like DocuSign).

Is there a difference between electronic and digital signatures?

It is worth noting that there is an important distinction between virtual or remote signatures and digital signatures. Virtual or remote signing usually refers to the practice of a party signing a document with a wet ink signature in separate locations, exchanging copies of the signed counterparts by email or other electronic means; and then after exchange, compiling the original counterparts.

On the other hand, a digital signature refers to an electronic signature that can be verified using a process that effectively validates and connects a signature to a specific person (without any printing and through a platform like DocuSign).

When are electronic signatures valid?

Generally, there are no restrictions on the use of electronic signatures by companies in relation to their business operations, however, their effectiveness will depend upon the intended use (for instance, whether or not a binding contract is required) and whether certain requirements have been met in respect of the signature.

Electronic signatures are valid at general law, and are also given validity under the Electronic Transactions Acts (ETAs) of each state if the electronic signature complies with the relevant statutory requirements. Prior to 6 May 2020, the ETAs *did not apply* to certain transactions or communications, including any requirement under the *Corporations Act 2001* (Corporations Act) (for instance, the signing requirements under section 127 of this Act).

However, in response to the COVID-19 pandemic, the Federal Treasurer issued a modifying instrument to allow for electronic signatures and split execution via electronic communication under section 127 (as detailed in the following section of this paper).

New modifications to electronic signing requirements under Corporations Act

The Federal Treasurer recently issued the *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* (Instrument) modifying the operation of sections 127(1) (documents executed without seal) and 129(5) (assumptions that can be made with documents signed under seal) of the Corporations Act, using an emergency instrument-making power under the *Coronavirus Economic Response Package Omnibus Act 2020*.

In effect for the period 6 May 2020 to 6 November 2020, the Instrument modifies section 127(1) to enable a company to execute a document electronically if the authorised signatory uses electronic means which:

- (a) reliably identify the signatory, and
- (b) indicate the signatory's intention about the contents of a document.

Additionally, the Instrument allows a company the benefit of split execution of documents by company directors, company secretaries and sole company directors by allowing those signatories to either sign a physical copy or counterpart of a document.

The Instrument also modifies section 129(5) allowing a counterparty to rely on the assumption that a document, signed under section 127(1) of the Corporations Act, is valid and effective, providing the requirements described above are complied with and, in the case of sole directors and sole company secretaries, the person executing the document is identified in the electronic communication as occupying both offices.

However, at the time of publication, Australia has not enacted any legislation allowing electronic witnessing of Wills, enduring powers of attorney, enduring powers of guardians, affidavits or statutory declarations.

Consider

Companies should be mindful of this exception, especially when an authorised representative of a company seeks to execute one of these documents on behalf of the company electronically.



The quote

While Australian law has developed to recognise the use of electronic signatures, the law is not always clear as to whether electronic signatures can or should be used for certain classes of documents.

Other temporary changes to the law

Each state and territory in Australia has enacted legislation and legislative instruments to amend state-based law regarding the execution and attestation of deeds, agreements and other documents (including to temporarily permit the audio-visual attestation of deed).

While this paper does not examine these temporary changes, they are generally designed to better facilitate electronic and digital execution of documents. These changes are not uniform across each state and territory, and we suggest seeking advice in relation to the status of the law in the relevant state.

What are the challenges with electronic signing?

While Australian law has developed to recognise the use of electronic signatures, the law is not always clear as to whether electronic signatures can or should be used for certain classes of documents.

Deeds

To be executed as a deed, the general view is that a document must still be in paper and signed with wet ink, unless a deed is executed in New South Wales (which permits electronic execution of deeds). In addition, the requirement for an individual's execution of a deed to be witnessed presents a challenge for e-signing. This is because attestation (witnessing) involves the witness actually being physically present when, and sign the deed when, the relevant party signs the deed (however, as mentioned, some states have made temporary changes to permit audio-visual witnessing). Further, the ETAs do not apply to the attestation of deeds in Western Australia, so ETAs cannot be relied on to validate electronic attestation.

Some documents must be original

In practice, wet ink signatures are required for a range of documents, including:

- documents to be registered at [the Western Australian Land Information Authority] Landgate (e.g. a transfer of land, caveats, discharges or mortgage, etc.)
- forms and documents required by the Australian Securities and Investments Commission (which may now be covered under *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* or the Australian Securities Exchange
- other documents that have registration and filing requirements which require a physically signed original to be lodged with a relevant authority.

Execution under section 127 of the Corporations Act

Most companies sign documents under section 127 of the Corporations Act. The ETAs do not usually apply to execution under section 127 of the Corporations Act, however, see the preceding commentary in this paper regarding the emergency Instrument modifying this position.

Recent cases have also suggested that the statutory assumptions should not be limited to wet ink signatures. There is an emerging judicial view that documents can be signed by the placement of electronic signatures under section 127, but the question is not entirely free from doubt.

Split execution

Can two officers of a company sign a separate identical counterpart of a document on behalf of the company, instead of both officers signing a single counterpart? This practice of 'split execution' is often utilised where the officers are in different locations, which is entirely possible in a COVID-19-affected business environment.

A recent case, *Bendigo and Adelaide Bank Limited v Pickard* [2019] SASC 123 (but compare *Re CCI Holdings Ltd* [2007] FCA 1283 at [6]–[7]), adopted a strict view that the practice of split execution does not satisfy the requirements of section 127, nor does the practice of electronically signing and then transmitting an electronic copy of the document for countersignature by the other officer. However, note that the current legislative modifications to split execution as described above (which, at the time of writing, only apply until 6 November 2020).

How can a business best use electronic signatures during an isolation period?

Business continuity plans should:

- address how contracts can be electronically signed by the business, and
- put in place practices to mitigate risks that contracts are invalidly signed by counterparties.

At a practical level, this may include considerations examined in the following discussion.

Appointing an attorney for wet ink signatures

If it is likely that company officers will be unavailable during a COVID-19 lockdown or remote working environment, the company could execute a power of attorney so that one or more persons can sign those documents that must be signed by a wet ink signature.

For instance, if documents need to be registered at Landgate in Western Australia, the power of attorney will need to be in registrable form and registered at Landgate.

The power of attorney (being a deed and not covered by the ETAs) will itself need to be properly executed on behalf of the company with wet ink signatures.

Use of digital signatures

Digital signatures come with the benefit of an authentication function (including date stamping and tracking) on a digital signing platform. This provides a reliable method to authenticate the identity of the person who signed the document, but it does not eliminate all risk. Like any handwritten signature can be forged, a digital signature can be 'forged' if the person does not protect their login information, is hacked or allows unauthorised use of the person signing by digital means.

Asking for evidence of authority

It is reasonable to request evidence that a company has properly authorised the entry into the document, including through a copy of a board resolution authorising the company and its relevant officers to execute the document, including electronically. This will be particularly relevant where a document is signed electronically under section 127 of the Corporations Act.

It is also prudent to request supporting confirmation from each signatory that the application of their electronic signature has been personally authenticated by them (that is, email or phone confirmation from the relevant signatory).

Preparing for split execution

During the COVID-19 pandemic, split execution may be unavoidable. In these circumstances, please note the preceding considerations and the modification of usual requirements for split execution.

Ensuring other requirements for a contract are met

While this paper focuses on signing by electronic means, parties should not overlook that effectively signing a document is just one aspect of creating a valid and enforceable agreement or deed. Whether an electronically signed document is valid and enforceable will also depend on:

- the legal nature of the entity signing (i.e. a foreign company must sign in accordance with the laws of the place of its incorporation)
- whether the relevant contractual and statutory requirements have been satisfied
- the capacity in which a person signs (i.e. as an attorney).FS